

Yun v Meissner

2018 NY Slip Op 32659(U)

October 15, 2018

Supreme Court, New York County

Docket Number: 653503/15

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

-----X
**TRACY YUN, Individually and Derivatively On
Behalf of LANCASTER EXECUTIVE LLC,**

Index No.: 653503/15

Plaintiff,

Motion Seq. No.: 003

-against-

DECISION & ORDER

JOERN MEISSNER,

Defendant.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Joern Meissner (“Meissner” or “defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing the Amended Complaint. Plaintiff Tracy Yun (“Yun” or “plaintiff”), Individually and Derivatively On Behalf of Lancaster Executive LLC (“Lancaster”) opposes defendant’s motion.

FACTUAL BACKGROUND

Yun contends that she and defendant maintained a romantic relationship from 2004 through 2011¹ and that in or about 2005, she and Meissner formed a company together named Manhattan Review, LLC (“Manhattan Review”).² Without providing a date, plaintiff alleges that defendant “transferred. . . his high amount of debt to [her]” amounting to over \$200,000.³ Plaintiff alleges that beginning in 2004, Meissner asked her to cover his debts on an ongoing

¹Yun alleges that Meissner is a German national who lived in Europe during the years at issue herein but visited the US several times a year. In 2005, he accepted a teaching position in England and in 2010 became a US permanent resident (Amended Complaint, ¶¶ 2, 8-9).

²Manhattan Review was a test preparation business which specialized in preparing students for the Graduate Management Aptitude Test (“GMAT”).

³Yun alleges that defendant “repeatedly misrepresented to [her] his true intention of keeping a romantic relationship with her” while transferring said debt to her (Amended Complaint, ¶ 12).

basis, and that between 2005 and 2011, in order to satisfy his debt, Meissner asked her to sell bottles of wine and ties that he owned, among other things. Yun further alleges that on several occasions in 2006, she lent money to defendant in the form of wire transfers (Amended Complaint, ¶15).⁴ Yun claims that “on January 7, 2007, Meissner executed a document acknowledging that he owed the money to Yun and stating that he would start paying Yun \$600 per month starting on February 1, 2007 until the debt he owed to Yun was repaid” (Amended Complaint, ¶ 17).

The note relied upon by plaintiff (the “Note”), provides in typewritten form:

“Printed: Sunday, January 7, 2007 6:09:21

\$600 per month starting 2/1/07”

Directly underneath, in handwritten form, the Note states:

“To: Tracy Yun

Dr. Meissner”

(Meissner Affidavit, Exhibit “A” [Exhibit “D” to Amended Complaint]).

Without supporting proof, plaintiff claims that Meissner paid her \$600 in cash in February 2007 and made periodic payments in cash and other forms between 2007 and December 18, 2011 (Amended Complaint, ¶ 18).

Yun alleges that on December 18, 2011, Meissner visited Yun’s apartment in New York, paid her \$200 in cash and asked her to sell five bottles of wine he owned in addition to several of his designer ties (Amended Complaint, ¶¶ 73-83). Yun fails to provide any proof of this 2011

⁴Yun claims that during their seven year romantic and business relationship, although defendant called her repeatedly, he “intentionally avoided writing emails” regarding the debt he owed Yun and his repayment promises (Amended Complaint, ¶ 31).

partial payment toward the debt allegedly owed by Meissner to Yun. Yun claims the December 18, 2011 payment comprised of cash, wines and ties, is the last payment made by Meissner toward the alleged debt (Amended Complaint, ¶ 83).

In June 2009, plaintiff and defendant executed a Limited Liability Company Agreement forming Lancaster giving Meissner an 80% ownership interest and Yun a 20% ownership interest (“Lancaster Agreement”) (Meissner Affidavit, Exhibit “C”). Yun contends that Meissner promised her that he would use the cash flow from Lancaster to satisfy his debt to her (Amended Complaint, ¶¶ 50, 107). Yun maintains that she deposited funds into Lancaster’s accounts, and that Meissner deposited checks from various clients of Lancaster (Amended Complaint, ¶¶ 108, 110). Plaintiff alleges, however, that Meissner used Lancaster to launder money through Lancaster’s bank account to avoid paying value added taxes (“VAT”) associated with his UK clients, and that he wired monies out of Lancaster’s accounts to his own personal account without informing Yun (Amended Complaint, ¶¶ 111-112, 115). Yun further alleges that from the end of 2009 until this action was filed in 2015, Meissner “failed to provide Yun with any pro rata money distribution, any financial information or any tax returns or forms including K-1’s” of Lancaster (Amended Complaint, ¶ 122).⁵

In 2012, Meissner filed an action individually and derivatively on behalf of Manhattan Review against Yun and Manhattan Enterprise Group LLC [Index No. 650913/12] pending before Hon. Andrea Masley, J.S.C., alleging among other things, that Yun refused to share with Meissner information about the financial affairs of Manhattan Review and drew compensation

⁵Yun claims that on October 13, 2015, she discovered that Lancaster is still active as a New York limited liability company (Amended Complaint, ¶ 119).

from the company without Meissner's knowledge or consent, and ultimately dissolved Manhattan Review and transferred all the company's assets to Manhattan Enterprise Group LLC, a company she formed. Meissner alleges causes of action sounding in breach of fiduciary duty, self dealing, tortious interference, unjust enrichment and defamation, among others (Index No. 650913/12 [First Amended Complaint, NYCEF Doc. No. 12]).

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d at 544 [internal citation omitted]).

Causes of Action based on the Note

Breach of Contract

Yun claims that Meissner has breached his obligations under the Note and as a result owes her \$225,730 as of December 2011. In support of his motion for summary judgment, Meissner argues that the purported Note is not a note, and that Yun's claims are time barred.

Specifically, Meissner argues that the Note does not list the sum Yun claims as being due, or any sum, nor does it contain a promise to pay or contain any terms for repayment, either by a date certain or on a condition (Defendant's Memorandum of Law at 4). Alternatively, Meissner argues that even if the Note could be construed as such, there is no proof that in 2011 Meissner paid Yun \$200 toward the alleged debt. Meissner maintains that it is too incredible that Meissner would have paid Yun \$200 in cash (in addition to giving her ties and wine) toward a debt of \$225,730. Yun fails to oppose defendant's argument that the Note does not qualify as an enforceable contract but proffers an Affidavit to support the purported payment by Meissner of \$200 (in addition to ties and wine) to establish that Yun's claim is not barred by the six year statute of limitations.

Yun's breach of contract cause of action fails for two reasons.

First, the Note does not constitute a legally enforceable contract. "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991] [internal quotation marks and citations omitted]; see *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989]). "[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013] [internal quotation marks and citation omitted]). In order to enforce a contract therefore, a contract must be sufficiently definitive to enable a court to ascertain the material terms of the parties' agreement (*Id.*). Here although Yun claims that the sum of \$225,730 is due under the Note, the Note fails to recite said figure, or contain a promise to pay such a debt. In addition, the Note does not set forth any terms for repayment on a date certain. The Note merely states "\$600

per month starting 2/1/2007” and “To: Tracy Yu, Dr. Meissner” (Amended Complaint, Exhibit “D”). Moreover, definiteness cannot be satisfied as there is “no objective method for supplying [the] missing term[s]” (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d at 91; *see also Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444-445 [1st Dept 2014]). In fact, the Note “is so vague and indefinite as to be virtually meaningless” (*Chemical Bank N.Y. Trust Co. v Staten Is. Bd. of Jewish Educ.*, 23 AD2d 833 [1st Dept 1965]).

Secondly, assuming arguendo this Court were to deem the Note as a valid contract, Yun’s claim for breach of contract based on the Note fails on statute of limitations grounds. An action upon a contractual obligation shall be commenced within six years (CPLR 213(2)). “[A] breach of contract cause of action accrues at the time of the breach” (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Here, the Note is dated January 7, 2007, and the subject action was filed on October 22, 2015, more than six years thereafter.

It is well settled however that a way to commence the statute of limitations running anew is to show that “there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder” (*Education Resources Inst., Inc v. Piazza*, 17 AD3d 513, 514 [2d Dept 2005] *quoting Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

With respect to the purported partial payments under the Note, Yun alleges that Meissner made a payment of \$600 in cash in February 2007 (Amended Complaint, ¶ 18) and that Meissner

to bring her breach of contract cause of action within the six year statute of limitations by providing a narrative leading up to an alleged partial payment by Meissner of \$200 in cash on December 18, 2011 (Amended Complaint, ¶¶ 64-83).

“The circumstances of such a [partial] payment may be proven by extrinsic evidence. For example, copies of cancelled checks and accompanying memoranda, the debtor’s books and records or an admission may demonstrate partial payment and a desire to remit the remaining sum” (*Education Resources Inst., Inc v. Piazza*, 17 AD3d at 514). Here Yun fails to present any admissible evidence of such a partial payment. In the Amended Complaint and her Affidavit in Support, Yun merely sets forth a narrative of the communications she purportedly had with Meissner on December 18, 2011 culminating in his visit to her apartment at 10:00 p.m. on that day at which time he allegedly paid her \$200 in cash and asked her to sell his wines and designer ties. Yun fails to provide receipts acknowledging such payment, or any other admissible evidence documenting same. Moreover rather than an admission by Meissner demonstrating partial payment and a desire to remit the remaining sum (*see Id.*; Yun Affidavit, ¶¶ 32-56), Meissner denies meeting with Yun on December 18, 2011, and denies giving her cash or wines and ties to sell as payment under the Note.⁶ Yun’s conclusory allegations that Meissner made partial payment toward the purported debt is insufficient to start the statute of limitations running anew. As such, Yun’s breach of contract claim based on the Note is alternatively barred by the

⁶Meissner states that they met for dinner on December 15, 2011, and that Yun “let [him] stay in her guest room overnight” (Meissner Affidavit, ¶ 19). Meissner further states “I do not recall giving her any cash, but if I did, it had nothing to do with the alleged “note” or any purported debt of \$225,730. It is simply unbelievable that I would tender, and that Yun would accept, some old ties, bottles of wine, and pocket money as payment under a note or to reduce a debt said to be close to a quarter million dollars” (*Id.*, ¶ 21).

statute of limitations.

Unjust enrichment

Yun also alleges a cause of action for unjust enrichment based on the Note (Amended Complaint, ¶¶ 131-137). “The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). “Under New York law, there is no identified statute of limitations within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative, a six-year statute of limitations applies” (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]).

Here, given that plaintiff’s unjust enrichment claim arises out of the same events underlying the Note, any such claims made thereunder are time-barred.⁷ As such, plaintiff’s cause of action for unjust enrichment based on the Note is dismissed.⁸

⁷In fact, plaintiff’s Second Cause of Action for unjust enrichment is by its terms referable to the Note (Amended Complaint, ¶¶ 131-137).

⁸Plaintiff did not raise any issue regarding tolling the statute of limitations of her unjust enrichment claim by virtue of defendant’s alleged payment to her of \$200 in cash in December 2011. However, a similar statute of limitations analysis applicable to plaintiff’s claim of partial payment relating to plaintiff’s breach of contract cause of action would apply to plaintiff’s cause of action for unjust enrichment.

Derivative Causes of Action

“A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually” (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]).

Threshold issues

Demand/Futility

Yun makes derivative claims for breach of contract purportedly on behalf of Lancaster. “A shareholder’s derivative action is an action brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation” (*Marx v Akers*, 88 NY2d 189, 193 [1996] quoting Business Corporation Law (“BCL”), §626(a) [internal quotation marks omitted]). Derivative suits may be filed by members of limited liability companies (*see Tzolis v Wolff*, 10 NY3d 100, 109 [2008]). BCL § 626(c)) provides that in a derivative suit “the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort.” It is well settled that to overcome a motion to dismiss for failure to plead such “demand futility”, plaintiff must make a particularized showing (*see Goldstein v Bass*, 138 AD3d 556, 556-557 [1st Dept 2016]).

Here, in plaintiff’s derivative causes of action sounding in breach of fiduciary duty, self-dealing and unjust enrichment, plaintiff alleges that “demand on the company to bring this action is futile” (Amended Complaint, ¶¶ 153, 162, 170). Defendant herein raises for the first time in this summary judgment motion, plaintiff’s failure to plead demand futility which is a pleading stage issue, ordinarily the subject of a pre-answer motion to dismiss. In the context of a motion

for summary judgment, this Court may look at the sufficiency of the evidence presented to determine whether a demand by Yun having a 20% interest in Lancaster on Meissner having a 80% interest in Lancaster would have been futile. Lancaster's structure as a two member LLC in conjunction with evidence in the record of the acrimonious and complicated relationship between Yun and Meissner, suffices for the purposes of this summary judgment motion to establish that a demand by Yun of Meissner would have been futile under these circumstances (*see generally Stavroulakis v Pelakanos*, 58 Misc3d 1221[A]) [Hon. Shirley Werner Kornreich, J.S.C. 2018]).

Yun's Withdrawal from Lancaster

Defendant argues that plaintiff has no standing to make derivative claims on behalf of Lancaster on grounds that she withdrew from Lancaster. The Lancaster Agreement provides that a member may withdraw only upon consent of all other members (Meissner Affidavit, Exhibit "C" [Lancaster Agreement, ¶ 21]). In support of his contention that Yun withdrew from Lancaster, defendant proffers an email, dated July 10, 2009, from Yun to Meissner wherein she states, "I don't want any association with you....I am filing the closing of Lancaster Executive LLC this week. I will not be in any financial association with you" (Meissner Affidavit, Exhibit "B").

Defendant's argument that Yun has no standing to sue derivatively based on her withdrawal is unavailing. Although said email appears to suggest that Yun may have intended to withdraw from Lancaster, is not clear on its face that Yun actually did so in accordance with the Lancaster Agreement. Furthermore, there is no evidence in the record demonstrating that Meissner consented to any such withdrawal as required by the Lancaster Agreement.

Breach of Contract

The only derivative allegation set forth in Yun's third cause of action for breach of contract on behalf of Lancaster is the claim that Meissner failed to pay VAT in the United Kingdom. In support of his motion for summary judgment, Meissner states that VAT obligations arise only when a manufacturer or service provider has sales exceeding approximately \$100,000 and that Lancaster never exceed the VAT threshold (Meissner Affidavit, ¶¶ 48-50).⁹ As such, Meissner has met his *prima facie* showing of entitlement to summary judgment. In opposition, plaintiff for the first time alleges that the issue is complex warranting further discovery despite her initial claims in the Amended Complaint that Meissner laundered money to avoid paying VAT.

Plaintiff's opposition is entirely conclusory without any evidence in the record that Lancaster was required to pay VAT in the UK and failed to do so (*see* Amended Complaint, ¶¶ 111, 145). As such, plaintiff's breach of contract cause of action brought derivatively on behalf of Lancaster is dismissed.

Judicial Dissolution of Lancaster

Yun claims that she has standing to seek dissolution of Lancaster and that Lancaster should be judicially dissolved "because it has become reasonably impractical to continue the business in conformance with the articles of formation and/or operating agreement" (Amended Complaint, ¶ 149). Yun claims that she is entitled to an award of a pro rata share of Lancaster's assets (*Id.*, ¶ 150).

⁹As proof Meissner attaches Schedule "C" filings for Lancaster for the years 2012-2015. Meissner further argues that Yun has not alleged that any taxing authority issued a notice of violation or raised any tax issue with Lancaster (Meissner Affidavit, ¶ 47; Exhibit "D").

Limited Liability Company Law § 702 permits a court to direct judicial dissolution “whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement” (CPLR 702; *see Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 126 [2d Dept 2010]). “[T]he petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible” (*Id.* at 131). “Dissolution is a drastic remedy” (*Id.*).

Here, plaintiff merely repeats the language of Limited Liability Company Law § 702 in the Amended Complaint by alleging “it has become reasonably impracticable to continue Lancaster’s business in conformance with the articles of incorporation and/or the operating agreement” (Amended Complaint, ¶ 149). Plaintiff fails to make the required showing under Limited Liability Company Law § 702. As such, plaintiff’s cause of action seeking a judicial dissolution of Lancaster is dismissed.

Breach of Fiduciary Duty

Yun’s fifth cause of action alleges that defendant breached his fiduciary duty to Lancaster by failing to pay VAT, and file tax returns in the US, diverting profits, cash and assets of Lancaster to himself and rendering Lancaster insolvent (Amended Complaint, ¶ 157-158). Yun also asserts a claim individually alleging that Meissner breached his fiduciary duty to Yun by failing to provide her with distributions, financial information and tax returns (*Id.*, ¶ 156).

“New York law does not provide a single statute of limitations period for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the

substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging ‘injury to property’ within the meaning of CPLR 214(4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations of CPLR 213 (1) applies” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [internal citations omitted]; see *Lebedev v Blavatnik*, 144 AD3d 24, 28-29 [1st Dept 2016]); *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003].

Here, whether or not couched as a personal or derivative claim, Yun’s breach of fiduciary cause of action primarily seeks damages, and as such, the three-year statute of limitations applies. Given that plaintiff’s breach of fiduciary duty allegations are for the most part predicated on events which took place in 2008 through at the very latest 2010 (when defendant allegedly failed to distribute financial information or tax returns of Lancaster) and Yun did not file the within action until 2015, plaintiff’s derivative cause of action for breach of fiduciary duty is time-barred.

Self-Dealing

Yun’s separate cause of action for self-dealing cannot stand. Self-dealing is evidence of breach of fiduciary duty (*see generally Allannic v Levin*, 57 AD3d 443, 444 [1st Dept 2008] [issue whether an allegation of self-dealing in that case constituted a breach of fiduciary duty]; *Parker v Marglin*, 56 AD3d 374, 374 [1st Dept 2008] [plaintiffs failed to adduce evidence of self-dealing, or other acts constituting breach of fiduciary duty]).

Having dismissed plaintiff’s breach of fiduciary duty cause of action, plaintiff’s cause of action for self-dealing is likewise dismissed.

Unjust Enrichment

Yun’s cause of action for unjust enrichment is couched as a derivative action on behalf of

Lancaster. Yun's allegations however are derivative only to the extent she alleges that Meissner's unjust enrichment in misappropriating assets has been at the expense of Lancaster.¹⁰

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [citations omitted]; *see also Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

Accordingly, given that plaintiff's unjust enrichment claims arise out of the same events governed by the Lancaster Agreement, plaintiff's derivative cause of action for unjust enrichment is dismissed.¹¹

Yun's Individual Cause of Action for Breach of Contract Included in her Derivative Cause of Action

Embedded in her derivative breach of contract cause of action, Yun makes several personal claims. Generally, "even if some of plaintiffs' claims [are] direct, [a] complaint the allegations of which confuse a shareholder's derivative and individual rights will...be dismissed" (*Yudell v Gilbert*, 99 AD3d at 115 [internal quotation marks and citations omitted]; *see Abrams v Donati*, 66 NY2d 951, 953 [1985]; *Dian Kui Su v Sing Ming Chao*, 150 AD3d 424, 425 [1st Dept

¹⁰Yun's allegations that Meissner unjustly retained property belonging to Yun is a personal not derivative claim.

¹¹In her derivative unjust enrichment cause of action, Yun seeks an accounting and in her 'wherefore clauses' seeks "an Order compelling Meissner to account for all revenues and profits of Lancaster" (Amended Complaint, ¶ 178). Plaintiff's request for such relief is unavailing absent a properly pled cause of action for an accounting.

2017] [“Dismissal of the second amended complaint was warranted, as the complaint mixes individual claims with derivative claims”). However, if a shareholder has alleged that he sustained a loss disproportionate to that sustained by the corporation, or if a defendant breached an independent duty owed to a shareholder, the cause of action may not be subject to dismissal (*Abrams v Donati*, 66 NY2d at 953-954; *Cortazar v Tomasino*, 150 AD3d 668, 671 [2d Dept 2017]).

Here, plaintiff clearly mixes individual claims in the third cause of action of the Amended Complaint, designated “Breach of Contract (Re: Lancaster Executive LLC).” Even if this Court were to consider plaintiff’s direct claims in her derivative breach of contract cause of action, these claims are unavailing.¹² In support of his motion for summary judgment, Meissner attests that as manager under the Lancaster Agreement, he was designated Lancaster’s “tax means partner” and was thereby given broad authority over Lancaster’s tax decisions. Defendant argues that Yun’s allegations that she did not receive any tax returns or K-1 forms from Lancaster are without merit given that Lancaster filed no tax returns from 2008 through 2011 (Meissner Affidavit, ¶¶ 31, 48-49).¹³ Yun’s allegation in her derivative cause of action that she received no distributions or financial information from Lancaster is vague and conclusory. Further, Yun fails to allege the she sustained a loss disproportionate to that sustained by Lancaster or that the

¹²For example, Yun alleges that “Meissner breached his obligation and never provided Yun with financial information, tax returns or K-1 returns” and “Meissner has not distributed any money to Yun and breached his obligation to do so” (Amended Complaint, ¶¶ 141-143).

¹³Meissner stated that he treated Lancaster as a single member LLC after Yun’s purported withdrawal in January 2009. He submits Schedule C’s for tax years 2012-2015 showing income of \$1, \$9,733, \$0 and \$0, respectively. In fact, Meissner claims that if Yun was still a member of Lancaster after 2009, she would owe taxes in 2013, being the year that Lancaster showed a profit (Meissner Affidavit, ¶ 51).

defendant breached an independent duty owed to her (*see Abrams v Donati*, 66 NY2d 953-954). In any event, such personal claims are mixed in with her derivative claims, and as such, these claims are dismissed.

Yun's Opposition

In opposition, Yun fails to oppose any of the substantive legal arguments made by Meissner in support of his motion for summary judgment. Rather, Yun (1) repeats the allegations set forth in the Amended Complaint; (2) provides a history of various other actions pending between the parties; and (3) argues in her Memorandum of Law that Meissner's motion must be denied given that there has been no discovery in this matter.

"CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of that party exist but cannot be stated. Under CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept 2006] [internal citations omitted]). "The party invoking [CPLR 3212(f)] must provide a proper evidentiary basis supporting its request for further discovery" (*Id* at 103).

Here, plaintiff fails to identify any fact that would justify postponing decision on the subject summary judgment motion. Plaintiff makes conclusory assertions that further discovery is needed relating to whether Meissner breached his fiduciary duty, the statute of limitations issue, Yun's withdrawal from Lancaster, and the VAT issue. Yun fails to identify any essential facts which is currently unavailable to her (*see Id.*)

Although Yun lists specific account information, from 2006 and January 2007, that she is seeking regarding her claims under the Note, Yun's argument for further discovery is unavailing. Having dismissed Yun's claims predicated on the Note on statute of limitations grounds, discovery of statements from 2006 and 2007 would not be relevant. Yun has "failed to come forward with more than a 'mere hope' that [Meissner] will uncover evidence that will prove [her] case" (*Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014]). Under the circumstances of this case, Yun's assertion that discovery is needed is therefore mere speculation which is an insufficient basis to postpone decision on a summary judgment motion pursuant to CPLR 3212(f) (*DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015]).

CONCLUSION


On the basis of the foregoing, it is

ORDERED, that defendant's motion for summary judgment dismissing plaintiff's Amended Complaint is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: *October 15, 2018*

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.